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IN THE
Supreme Court Of The United States
OCTOBER TERM, 1983

LAWRENCE WILLIAM ROSENWALD,
Individually and on behalf of all
Constables in Montgomery County
and the Commonwealth of Pennsylvania

and

THE PENNSYLVANIA STATE CONSTABLES
ASSOCIATION, INC., Intervenor,

Petitioners,

vs.

ALEXANDER BARBIERI, Court Administrator
Of Pennsylvania, et al.

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF PENNSYLVANIA

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and

HARVEY BARTLE, ESQUIRE, Attorney General
Of The Commonwealth Of Pennsylvania

and

ROBERT HANNUM And The Commissioners Of
The Township Of Cheltenham and all other
similarly situated Townships, Boroughs
and Municipalities in the County of
Montgomery and Commonwealth of Pennsylvania

and

HONORABLE RICHARD LOWE, President Judge
of the Court of Common Pleas of Mont-
gomery County and all other President
Judges and other Judges similarly sit-
uate in the County of Montgomery and the
Commonwealth of Pennsylvania

and

DISTRICT JUSTICE JAMES L. O'BRIEN,
Individually and all other District
Justices similarly situated in the
County of Montgomery and the Commonwealth
of Pennsylvania

QUESTION PRESENTED

- 1. DID THE DENIAL OF LEGAL REPRESENTATION DEPRIVE PETITIONER THE REQUIREMENT OF DUE PROCESS AFFORDED BY THE FIFTH AND FOURTEENTH AMENDMENTS?**

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IN THE
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LAWRENCE WILLIAM ROSENWALD,
Individually and on behalf of all
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and

THE PENNSYLVANIA STATES CONSTABLES
ASSOCIATION, INC., Intervenor,

Petitioners,

vs.

ALEXANDER BARBIERI, Court Administrator
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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

OPINION BELOW

The opinion of the Supreme Court of Pennsylvania is reported at 462 A.2d 644 (July 5, 1983) (Advance Sheets). The opinion is set forth in Appendix "A" to this Petition.

JURISDICTION

The order of the Supreme Court of Pennsylvania was entered July 5, 1983. The final order of the Supreme Court of Pennsylvania was entered

September 2, 1983 denying petitioners' Application for Reargument from the judgment of the Supreme Court of Pennsylvania of July 5, 1983.

Notice of filing for Writ of Certiorari to Review was filed in the Supreme Court of Pennsylvania on November 14, 1983.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL
PROVISIONS INVOLVED

The United States Constitutional Provisions involved are Amendment 14 and Amendment 5.

Amendment 14 provides as follows:

"(N)or shall any state deprive any person of life, liberty, or property without due process of law."

Amendment 5 provides as follows:

"(N)or shall any person...be deprived of life, liberty or property, without due process of law."

STATEMENT

On or about March 17, 1980 a trespass action (hereinafter referred to as the Reuben action) was filed in the Court of Common Pleas, Montgomery County, Pennsylvania. The plaintiff, Gene Reuben, sued Lawrence Rosenwald, a constable initially appointed by the President Judge of Montgomery County and thereafter elected by the voters of Cheltenham Township, Montgomery County, and James L. O'Brien, a District Justice presiding in Cheltenham Township, for libel and negligent infliction of emotional distress. The Reuben action arose out of a posting of a constable sale bill by Rosenwald on Reuben's property at the specific direction of O'Brien, who had issued the Writ of Execution just seven days earlier. No property of Gene Reuben was ever sold by Constable Rosenwald.

Shortly after being served with the Complaint in the Reuben action, Constable Rosenwald contacted various governmental agencies including the Pennsylvania Department of Justice (now designated the Office of Attorney General), the Court Administrator's Office of Pennsylvania, the named judicial defendants and Cheltenham Township, requesting that each agency provide him legal representation in the Reuben action. Each of the defendants Constable Rosenwald contacted

rejected his request.

Rosenwald subsequently filed this instant action on his own behalf, and on behalf of all other Pennsylvania constables, seeking a Declaratory Judgment to determine which of the aforementioned governmental agencies were legally obligated to represent him and his bonding company which bonded him at the time of the Reuben action as well as which governmental agency was obligated to pay a judgment (if any) entered against him or the bonding company in the Reuben action.

The named defendants in this instant action are: (1) Harvey Bartle, former Acting Attorney General of the Commonwealth of Pennsylvania; (2) Robert Hannum and the Commissioners of Cheltenham Township; (3) The Honorable Richard Lowe, President Judge of Montgomery County; (4) District Justice James L. O'Brien, a District Justice presiding in Cheltenham Township and (5) Alexander F. Barbieri, Court Administrator of the Commonwealth of Pennsylvania.

As to the action initially filed against Rosenwald and O'Brien, the case was dismissed on defendants' preliminary objections by the Court of Common Pleas of Montgomery County as to all defendants, including Rosenwald's statutorily required constable bonding company, Aetna Casualty and Surety Company, whom Rosenwald

was obligated to provide legal representation for. Subsequently, after the deciding of the preliminary objections, Reuben appealed the lower court decision--as to Rosenwald only--to the Pennsylvania Superior Court, Reuben v. O'Brien, 445 A.2d 801(1982), substantially affirmed the lower court, but remanded for a determination on the alleged libel claim of Reuben.

A Motion For Judgment On The Pleadings was filed by the petitioner herein against Reuben and judgment was entered for the petitioner thereon. At the present time, Reuben's appeal from the judgment of the lower court is pending. Defendant James L. O'Brien's Motion To Dismiss the appeal was denied by the Superior Court of Pennsylvania. However, the appeal has been transferred to the Commonwealth Court of Pennsylvania.

This matter was initially filed in the Montgomery County Court of Common Pleas on July 7, 1980. Following Preliminary Objections filed by defendant Bartle, pursuant to 42 Pa. C.S.A. Section 761(b), plaintiff Rosenwald voluntarily transferred the action to the Commonwealth Court. New Preliminary Objections were filed by all defendants once this matter was docketed in the Commonwealth Court. Oral argument was scheduled on the Preliminary Objections for June 2, 1981. However, prior to the scheduled argument date, the Pennsylvania State Constable Association

moved the Court for leave to intervene. Intervenor's petition was granted on May 27, 1981 and on September 14, 1982, oral argument was held before the Commonwealth Court, en banc.

On February 14, 1983, the Commonwealth Court entered an order and issued a written opinion.

March 14, 1983 an appeal of the Commonwealth Court Order of February 14, 1983 was taken by the filing of a Notice of Joint Appeal of petitioner Lawrence William Rosenwald and intervening party petitioner, the Pennsylvania State Constables Association, Inc. to the Pennsylvania Supreme Court. Additionally, original defendant, Alexander F. Barbieri, the Court Administrator of Pennsylvania, filed for leave to appeal which was granted and Rosenwald filed a Petition For Consolidation of Multiple Appeals. This motion was granted. Argument on all appeals was heard on May 24, 1983 and on July 5, 1983 the Supreme Court of Pennsylvania entered a Judgment and issued a written opinion affirming the Order of the Commonwealth Court of Pennsylvania insofar as it sustained the preliminary objections of the Attorney General of Pennsylvania, the President Judge of the Court of Common Pleas of Montgomery County, the District Justice of Montgomery County and Cheltenham Township, and reversed the Order insofar as it overruled the Preliminary Objections of the Administrator.

Petitioner's Application For Reargument from this judgment was denied on September 2, 1983. The Pennsylvania Supreme Court held that petitioner was not entitled to any legal representation from the named defendants.

Petitioner now petitions this court for a Writ of Certiorari to review the final order of the Supreme Court of Pennsylvania.

ARGUMENT

Petitioner believes that the question presented here is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of the question. The reason the question is substantial is set out below.

The Supreme Court of Pennsylvania, among other things, held in this case that petitioner was not entitled to legal representation from the named defendants consistent with the Pennsylvania Constitution, and the First Class Township Code Act of June 24, 1931, P.L. 1206, Art. V, Section 502, as amended, 53 P.S. Section 55503, (sic), Section 55103, and refused to rule that petitioner was entitled to the provision of legal representation.

However, petitioner disagrees with the opinion of the Supreme Court of Pennsylvania and asserts that his right and interest in legal representation has been deprived without due process and in clear violation of the standards of the Pennsylvania Constitution and statutes. The opinion of the Supreme Court raises a substantial federal question concerning the property interest and right of providing legal representation as protected by due process. The reason a substantial federal question is involved is because the Supreme Court of Pennsylvania has

totally refused to recognize that petitioner has a protected property right and interest and legitimate claim of entitlement in the provision of legal representation encompassed by United States Constitution and Pennsylvania Constitution and statutes which has been denied to him without due process of law. This refusal of the Supreme Court has resulted in the deprivation of a constitutionally protected property right and the constructive prevention of a class of individuals' access to courts. This very act occurred in this case where the determination of the Supreme Court held that neither the President Judge of the Court of Common Pleas of Montgomery County, District Justice of Montgomery County, Court Administrator and Attorney General of Pennsylvania, and Cheltenham Township were obligated to provide legal representation to petitioner. This is inconsistent with the constitutional standards set out in Gilmore v. Lynch, 319 F. Supp. 105, 11 S.Ct. 864, 401 U.S. 906, 27 L.Ed. 2d 802 affd. Younger v. Gilmore 92 S.Ct. 250, 404 U.S. 15, 30 L.Ed. 2d 142, that, "Reasonable access to courts is a constitutional imperative."

It is a deprivation of a person's constitutional rights to prevent him access to civil courts. See Application of Brux, 216 F. Supp. 956(1963) and Lee v. Habib, 424 F. 2d 891, 137 U.S. App. D.C. 403(1970). The Pennsylvania Su-

preme Court decision embodies the standard disallowed in the ruling in Waldron v. British Petroleum Company, 231 F. Supp. 72(1964), that, "Violation of public policy may not be loosely invoked as a reason for depriving a litigant of his day in court." Moreover, provisions of the Pennsylvania Constitution guarantee access to the courts. See P.S. Pa. Const. Art. 1, Sec. 11; U.S.C.A. Const. A. 14. With these reasons in mind, a discussion of the law that applies to this question will be set out below.

The Fifth Amendment to the United States Constitution as made applicable to the States through the Fourteenth Amendment to the United States Constitution protects against unreasonable and arbitrary state deprivations which impose forfeitures, punishments, or costs. See Edelberg v. Illinois Racing Board, 540 F. 2d 279(1970). Due process protections apply to protectable liberty or property interest. See U.S.C.A. Amendment 5; and Solomon v. Elsea, 676 F.2d 282(1982).

The Pennsylvania Constitution provides a state constitutional right and supports petitioners' legitimate claim of entitlement to legal representation by providing that: "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and conduct of all courts, justices of the peace

and all officers serving process or enforcement orders, judgment or decrees of any Court of justices of the peace..." (emphasis added).

Article V, Section 10c, Pennsylvania Constitution.

A constable is an office functionally similar, if not identical, to that of a Federal Marshall to whom legal representation is in all instances^a provided. 42 Pa. C.S.A. 8501 et seq. and 42 Pa. C.S.A. Section 8525, is the applicable statutory law of Pennsylvania entitling petitioner to his legitimate right of legal representation by the Attorney General of Pennsylvania.

When an action is brought...against an employee of the Commonwealth government, and it is alleged that the act of the employee which gave rise to the claim was within the scope of the office or duties of the employee,... the Attorney General shall defend the action, unless the Attorney General determines that the act did not occur within the scope of the office of the employee... (emphasis added). 42 Pa. C.S.A. 8525.

At no time has the Attorney General refused to represent petitioner for the reason that the

act did not occur within the scope of his office. Petitioner falls within the Pennsylvania statutory definition "employee" which is defined as:

any person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not..., including... any elected officer... or any other person designated to act for the government unit... (emphasis added), 42 Pa. C.S.A. 8501.

The term "government unit" is defined at 42 Pa. C.S.A. Section 102 as:

officers and agencies or any court or other officer or agency of the unified judicial system." (emphasis added).

As stated above, a constable is an officer and employee and government unit under the authority of the statutory law of Pennsylvania and the Pennsylvania Constitution. Petitioner therefore has a legitimate expectation of the provision of legal representation.

The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests a person has already acquired in specific benefits, property interests are created,

and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law, rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.

Contra-Costa Theatre, Inc. v. City of Concord, 511 F. Supp. 87.

In reaching its determination that petitioner was not entitled to representation, the Pennsylvania Supreme Court chose to ignore appellate case law of the related cases stating,

"A constable, charged with the responsibility of serving process and enforcing the judgments of the district court is an officer of the unified judiciary system." (emphasis added). Reuben v. O'Brien, 445 A.2d 801(1982).

An officer is entitled to representation by all named defendants and hence has a legitimate property interest and expectation in it being provided when requested.

Petitioners' legitimate expectation and claim of entitlement to his property interest in being afforded legal representation by the Court Administrator of Pennsylvania, in addition to all named defendants, is based upon the mutual

and historical understanding that representation was provided constables and would continue to be so provided. From 1975 to October 20, 1979 the Court Administrator of Pennsylvania regularly represented constables who were sued in the performance of their duties. Entitlement to a property interest, invoking procedural due process protection, may exist without statute, but in such situation there must be a mutually explicit understanding by both parties concerning receipt of the benefit. See Williams V. Barry, 490 F. Supp. 946(1980). In that it has been clearly established that under 42 Pa. C.S.A. Section 8525, petitioner is an employee of the Commonwealth entitled to legal representation, the constitutional standard established by Kennedy v. Robb, 547 F.2d 408, app. den. 97 S.Ct. 1225, 430 U.S. 913, 51 L.Ed. 2d 592, cert. den. 97 S.Ct. 2687, 431 U.S. 959, 53 L.Ed. 2d 278, applies. Procedural due process is due a public employee who demonstrates either a constitutionally protected liberty or property interest. See Kennedy v. Robb, supra.

Further, a property interest exists when one has a legitimate claim of entitlement to a right arising from such sources as state statute, local ordinances, and employment contracts. See Bunting v. City of Columbia, 639 F.2d 1090(1981) (emphasis added). The applicable state statute and ordinance is the First Class Township Code

Act of June 24, 1931, P.L. 1206, Art. V. Section 503, as amended, 53 P.S. Section 55103. (The Code) "...does not include any provisions, and shall not be construed to repeal any act relating to...(inter alia) constables." Art. I., Section 603, as amended, 42 Pa. C.S.A. 8547 is the statute applicable to defendant Cheltenham Township. It establishes a mandatory duty to provide a constable legal assistance, when "...it is alleged that the act of the employee which gave rise to the claim was within the scope of the office or duties of the employee, the local agency shall, upon the written request of the employee, defend the action, unless or until there is a judicial determination that such act was not within the scope of the office or duties of the employee." (emphasis added). The language of the state statute entitling petitioners to a right, interest and expectation of the provision of legal assistance is clearly established by state statute which the Supreme Court has misapprehended thus depriving petitioner of the right without due process. In Hermes v. Hein, 511 F. Supp. 123, the Court held that, "Written rules, regulations, statutes and judicial decisions are not the sole affirmative sources of a protected property interest under state law; well-established patterns of practice and existing understandings are recognized as al-

ternative sources of protected property interest..." Petitioner has demonstrated the existence of written rules, regulations, statutes, judicial decisions and alternative bases of his protected property right and interest, such as the existence of mutual understandings and well-established practices. This Court may properly examine the deprivation of his rights, without due process of law, by all named Commonwealth defendants and, as affirmed by the decision of the Supreme Court of Pennsylvania.

Prior to termination of petitioner's right to legal representation, it is mandatory that he be afforded pre-termination notice and a hearing, followed by a full hearing, as mandated by the safeguards established by this Court to afford him the full extent of process he is due. See Goss v. Lopez, 419 U.S. 565(1975). This is in the event that the Court does not determine that his right to legal representation is a fundamental interest and compelling right constitutionally protected.

The case of Matthews v. Eldridge, 424 U.S. 319(1976) contains an analysis to determine whether a prior hearing is required and the extent of procedural requirements. This determination is made by weighing

(1) the importance of the individual

interest involved;

- (2) the value of specific procedural safeguards to that interest; and
- (3) the governmental interest in fiscal and administrative efficiency.

See Matthews v. Eldridge, supra.

Applying this balancing test the full extent of procedural safeguards must be afforded petitioner. This conclusion is similar to the analogous case involving termination of welfare benefits where this Court held individuals have a protected interest in the continued receipt of welfare benefits affording the recipients full evidentiary hearings and notice prior to discontinuing the benefits. See Goldberg v. Kelly, 397 U.S. 354(1970). These same interests are present here and petitioner's right to legal representation has been violated. However, because petitioner's protected status and right to legal representation is clear according to the Pennsylvania Constitution and statutes the Court may make this determination initially and order full reinstatement of his right to legal representation and implement remedial measures.

This Court, when considering the totality of the circumstances and considering the balancing test, it should be apparent that there has been a deprivation of a legitimate property right. Because this right is protected by the

Due Process Clause of the Fifth Amendment and Fourteenth Amendment, no valid reason exists for the deprivation. It is equally apparent that gross prejudice has resulted to petitioner by reason of being denied access to the Court as a result of being deprived the right to legal representation by each of the named defendants.

The above clearly reflects that a substantial federal question concerning government employees' rights is present in this case. This Court should look at this case and see if the States, especially Pennsylvania, are depriving constables' protected property rights and interests in violation of the United States Constitution, thus violating their Fifth and Fourteenth Amendment due process rights, and stop this practice of denying legal representation. It is important that this case be accepted for decision because an important federal question of violation of Fifth and Fourteenth Amendment rights of a petitioner in this type of situation is present and urgently calls for resolution.

CONCLUSION

Petitioner submits that for the above reasons the Petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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APPENDIX

Supreme Court of Pennsylvania

A-1

APPENDIX "A" ~~Eastern District~~

LAWRENCE WILLIAM ROSENWALD,
Individually and on behalf of all
constables in Montgomery County
and the Commonwealth of Penna.

Appellant at No. 30

v.

ALEXANDER F. BARBIERI,
Court Administrator of
Pennsylvania

Appellant at No. 31

: Nos. 30 & 31 Appeal Docket 1983

:
: (Commonwealth Court No. 66 T.D.
: 1980)

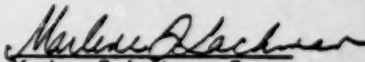
J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here ordered and

adjudged by this Court that the ORDER of the

COMMONWEALTH COURT, be, and the same is hereby AFFIRMED insofar as it sustained the preliminary objections of Attorney General of Pennsylvania, the President Judge of the Court of Common Pleas of Montgomery County the District Justice of Montgomery County and Cheltenham Township. The ORDER is REVERSED insofar as it overruled the Preliminary Objections of the Administrator.

BY THE COURT:


Marlene F. Lachman, Esq.
Prothonotary

Dated: July 5, 1983.

[J-188-1983]

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LAWRENCE WILLIAM ROSENWALD, : No. 30 & 31 E.D. Appeal Dkt. 1983
 Individually and on behalf :
 of all constables in Montgomery :
 County and the Commonwealth :
 of Pennsylvania, :

Appellant on No. 30 E.D. :
 Appeal Docket, 1983 : Appeal from Order of the
 Appellee on No. 31 E.D. : Commonwealth Court of
 Appeal Docket, 1983 : Pennsylvania -- entered
 : on the 14th day of February,
 : 1983 at No. 66 T.D. 1980

v.

ALEXANDER F. BARBIERI,
 Court Administrator of
 Pennsylvania,

Appellee on No. 30 E.D. :
 Appeal Docket, 1983 :
 Appellant on No. 31 E.D. :
 Appeal Docket, 1983 : ARGUED: May 24, 1983

OPINION

JUSTICE ZAPPALA

Filed: July 5, 1983

Plaintiff, Lawrence Rosenwald, is an elected constable of Cheltenham Township, a first class township in Montgomery County. He and Cheltenham Township District Justice James O'Brien were sued in the Court of Common Pleas of Montgomery County by Gene Reuben. The complaint was filed on March 17, 1980. Reuben alleged that Eric Klein filed a complaint against her in District Justice O'Brien's court on November 18, 1978 claiming \$138.00 for dry cleaning services allegedly rendered, that a judgment was entered for Klein in the amount of the claim on December 6, that an Order of Execution was issued on March 29,

1979, that Reuben paid the judgment and costs on April 3, and that despite such payment¹, Plaintiff posted a notice of a constable's sale on Reuben's property on April 7.

Reuben further asserts that she was libeled and suffered mental distress and embarrassment. The action against the District Justice of Montgomery County was dismissed on the basis of judicial immunity. The action against Plaintiff was dismissed on the basis of the statute of limitations. Reuben appealed as to Plaintiff (Rosenwald) only. The Superior Court held that the claim of improper action on the part of the Plaintiff in his capacity of constable was subject to the six month limitation period for actions against officers of the government for acts done in the execution of their office, Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, effective June 27, 1978, §5522, 42 P.C.S.A. §5522, and was therefore barred. The court also held that the part of the complaint claiming intentional and malicious libel for the purpose of exposing Reuben to contempt and ridicule and reflecting adversely on her integrity and credit alleged an intentional tort committed outside the scope of Plaintiff's office, was subject to the one year limitation period for libel actions, Judicial Code, §5523, 42 P.C.S.A. §5523, and was not barred. The case was remanded for further proceedings, Reuben v. O'Brien, 299 Pa. Super. 372, 445 A.2d 801 (1982).

1. Although the issue of prior payment by Reuben was raised collaterally, it has no bearing in the disposition of the issues now or previously before this Court.

Plaintiff claims he is entitled to be provided with legal representation for the defense of Reuben's suit against him and to have any judgment against him paid. He filed an action against five defendants in the Commonwealth Court seeking a declaratory judgment as to which defendant, if any, is required to represent him. The defendants so named are Court Administrator (Alexander Barbieri; Appellant here, hereafter Administrator), the Attorney General of Pennsylvania, the President Judge of the Court of Common Pleas of Montgomery County, District Justice of Montgomery County, and Cheltenham Township. All the defendants filed preliminary objections in the nature of a demurrer. The Commonwealth Court overruled the preliminary objections as to the Court Administrator and sustained the objections as to all other defendants. We granted the Administrator permission for an interlocutory appeal from the Order of the Commonwealth Court insofar as it overruled his preliminary objections. Plaintiff filed a separate appeal asserting error in the Commonwealth Court's sustaining of the preliminary objections as to the other named defendants. We consolidated Plaintiff's appeal with that of the Administrator. An Order dismissing preliminary objections is interlocutory, Marshall v. Powers, 477 Pa. 306, 383 A.2d 446 (1978), but an Order sustaining them is not, Estate of Gasparini v. Medical Center of Beaver County, Inc., Rochester Division, 481 Pa. 266, 409 A.2d 343 (1979). In reviewing the decision, we will

follow the standard set forth in Gekas v. Shapp, 469 Pa. 1, 364 A.2d 691 (1976), where we held that a demurrer to a complaint admits all well-pleaded facts averred in the complaint and that in order for the demurrer to be sustained, the complaint must indicate on its face that the claim cannot be satisfied and the law will not permit recovery.

As to the asserted claim against the President Judge of the Court of Common Pleas and District Justice of Montgomery County, the Commonwealth Court dismissed Plaintiff's complaint on the basis that "there is no law or rule which creates a duty for either of them to provide legal representation to constables". There is in fact no such legal proviso that requires representation. That being so, we find that the Plaintiff has not established a right to representation. The Commonwealth Court was therefore correct in sustaining the preliminary objections as relates to the Court of Common Pleas of Montgomery County and the District Justice of Montgomery County.

The claims against the other named defendants cannot be dealt with in this fashion because the law does provide under certain circumstances representation by the Court Administrator, the Attorney General of Pennsylvania, and municipalities. It will be necessary to examine specific state provisions and their application to representation of constables.

The obligations of the Attorney General of Pennsylvania to provide legal defense, which Plaintiff claims cover him, are

[J-188-1983] --

contained in the Judicial Code, Chapter 85, Subchapter B, added by October 5, 1980, P.L. 693, No. 142, §221(1), 42 P.C.S.A. §§8521-8528. These provisions allow suits against the Commonwealth without the bar of the sovereign immunity in certain enumerated situations, 42 P.C.S.A. §8522(b). It is provided in 42 P.S. §8525 that:

When an action is brought under this subchapter against an employee of the Commonwealth government, and it is alleged that the act of the employee which gave rise to the claim was within the scope of the duties of the employee, the Commonwealth through the Attorney General shall defend the action, unless the Attorney General determines that the act did not occur within the scope of the office or duties of the employee.

This section provides for representation by the Attorney General of Pennsylvania only for employees of the Commonwealth. For purposes of lawsuits covered by this provision, an employee is defined in 42 P.S. §8501 as:

Any person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not and whether within or without the territorial boundaries of the government unit, including any volunteer fireman and any elected or appointed officer, member of a governing body or other person designated to act for the government unit. Independent contractors under contract to the government unit and their employees and agents and persons performing tasks over which the government unit has no legal right of control are not employees of the government unit.

Plaintiff was neither acting for nor under the control of the

Commonwealth. Therefore, he cannot be considered to have been an employee of the Commonwealth.

As to the Administrator, Plaintiff cites Rule of Judicial Administration 505, which states that "The Administrative Office (of Pennsylvania Courts) shall have the power and its duties shall be (inter alia) to provide to personnel of the system (emphasis added) legal services and, when appropriate, representation by legal counsel".

Rule 102 defines "personnel of the system" as "judges and other judicial officers, their personal staff, the administrative staff of courts and justices of the peace, and the staff of the administrative office and other central staff".

Rule 102 defines "related staff" (emphasis added) as "all individuals employed at public expense who serve the unified judicial system ... (other than) personnel of the system". It defines "system and related personnel" as:

Personnel of the system and related staff. The term includes district attorneys, public defenders, sheriffs and other officers serving process or enforcing orders, registers of wills, prothonotaries, excluding prothonotaries of the Supreme Court, Superior Court and the Commonwealth Court of Pennsylvania, clerks of the courts, clerks of the orphan's court division, prison and correctional officials, and the personnel of all of the foregoing.

We find that the term "related staff" covers those whose function aids the judicial process but who are not supervised by the courts. These definitions, clearly distinguish between

"personnel of the system" and "related staff". Under the definitions, we find that Plaintiff is included in "related staff" and not "personnel of the system". As we find that a constable is by definition included in the related staff, we conclude that constables are not by definition "Personnel of the System", which would permit representation as set forth under Rule 505 of Judicial Administration. As the Plaintiff is not included in "personnel of the system", he is not among those whom the administrator is obligated to provide with legal representation.

In determining whether Plaintiff is entitled to be provided with legal representation by Cheltenham Township, we must first determine whether he is an officer or employee of the township. Plaintiff claims that he is covered by the Judicial Code, 42 P.C.S.A. §8547:

(a) Mandatory provision of legal assistance generally.--When an action is brought against an employee of a local agency for damages on account of an injury to a person or property, and it is alleged that the act of the employee which gave rise to the claim was within the scope of the office or duties of the employee, the local agency shall, upon the written request of the employee, defend the action, unless or until there is a judicial determination that such act was not within the scope of the office or duties of the employee.

(b) Optional provision of legal assistance generally.--When an action is brought against an employee of a local agency for damages on account of an injury to a person or property, and it is not alleged that the act of the

employee which gave rise to the claim was within the scope of his office or duties, the local agency may, upon the written request of the employee, defend the action, and such undertaking to defend thereafter may be withdrawn only with the approval of the court. If the local agency has refused a written request to defend the action, and it is judicially determined that the act was, or that the employee in good faith reasonably believed that such act was, within the scope of the office or duties of the employee and did not constitute a crime, actual fraud, actual malice or willful misconduct, the local agency shall reimburse the employee for the expenses of his legal defense in such amounts as shall be determined to be reasonable by the court.

The Code provides at 42 P.S. §8548 that:

When an action is brought against an employee of a local agency for damages on account of an injury to a person or property, and he has given timely prior written notice to the local agency, and it is judicially determined that an act of the employee caused the injury and such act was, or that the employee in good faith reasonably believed that such act was, within the scope of his office or duties, the local agency shall indemnify the employee for the payment of any judgment on the suit.

The definition of an employee as quoted in §8501 is applicable under the terms of that section to actions against any governmental unit, including a local agency. We find that Plaintiff was neither acting on behalf of nor under the control of Cheltenham Township and was, therefore, not an employee of the township. Service of process in a case before a District Justice may be made by any constable in the county where the magisterial district is located, Rule of Civil Procedure for District

Justices 307. Plaintiff could serve process in a case not being tried in the magisterial district where Cheltenham Township is located and not otherwise having anything to do with the township. The township does not have the ability to control Plaintiff's activities, regardless of which magisterial district he is working in. We note further that a constable is not paid by the municipality, but is compensated by fees for services, Act of July 20, 1917, P.L. 1138, as amended, 13 P.S. §61. We also note the First Class Township Code Act of June 24, 1931, P.L. 1206, Art. V. §503, as amended, 53 P.S. §55503, which enumerates the elected officers of the township and does not include the constable. (The Code) "... does not include any provisions, and shall not be construed to repeal any act, relating to ... (inter alia) constables", Art. I., §603, as amended.

We find, therefore, that the Plaintiff is not entitled to any representation from the named defendants. This Court is being requested to do by judicial fiat what is rightfully the prerogative and responsibility of the legislative branch of government. Heretofore, specific provisions have been made to provide legal representation. See, e.g., The County Code, Act of August 9, 1955, P.L. 323, §1213, as amended, 16 P.S. §1213, relating to sheriffs.

The Order of the Commonwealth Court is affirmed insofar as it sustained the preliminary objections of Attorney General of Pennsylvania, the President Judge of the Court of Common Pleas of

Montgomery County, the District Justice of Montgomery County, and Cheltenham Township. The Order is reversed insofar as it overruled the preliminary objections of the Administrator.

Mr. Justice Nix did not participate in the consideration or decision of this case.

Mr. Justice Hutchinson did not participate in the decision of this case.

Mr. Justice Larsen dissents.



Supreme Court of Pennsylvania

APPENDIX "B"

Eastern District

MARLENE F. LACHMAN, ESQ.
PROTHONOTARY455 CITY HALL
PHILADELPHIA, PA. 19107
(215) 422-6000PATRICK TASSOS
Deputy Prothonotary

September 6, 1983

Robert Morris Cohen, Esq.
130 Greenwood Avenue
Wyncote, Pa. 19095

RE: Lawrence William Rosenwald, individually, and on
behalf of all constables in Montgomery County, etc.,
Appellant v.
Alexander Barbieri, Court Administrator of Pennsylvania,
etc., Appellee
Nos. 30 and 31 E. D. Appeal Docket 1983

Dear Mr. Cohen:

This is to advise you that the following Order has been endorsed on
the Application for Reargument, filed in the above-captioned matter:

September 2, 1983

Application for Reargument denied. Per Curiam.

Very truly yours,

Marlene F. Lachman, Esq.
Prothonotary

Patrick Tassos,
Deputy Prothonotary

PT:jpa

cc: Kevin P. O'Neill, Esq.
Marc G Brecher, Esq.
Gilbert P. High, Jr., Esq.
Howard W. Abramson, Esq.
West Publishing Company

APPENDIX "C"

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

ROBERT MORRIS COHEN, ASSOCIATES
MICHELLE COOPERSMITH BERK, ESQUIRE
130 Greenwood Avenue
Wyncote, Pennsylvania 19095
Attorney I.D. #35515
(215) 885-1373

LAWRENCE WILLIAM ROSENWALD, : No. 30 & No. 31
Individually and on behalf :
of all Constables in :
Montgomery County and the : APPEAL DOCKET 1983
Commonwealth of Pennsylvania :
Appellant at No. 30 :

vs. :

ALEXANDER F. BARBIERI, Court :
Administrator of Pennsylvania, et al.
Appellant at No. 31

FILED NOVEMBER 14, 1983

NOTICE FOR FILING FOR WRIT
OF CERTIORARI TO REVIEW

COMES the Appellant-Petitioner Lawrence William Rosenwald, and hereby gives notice of filing for Writ of Certiorari to review the final decision denying appellant's Application for Reargument on September 2, 1983 from the judgment and opinion delivered on July 5, 1983, by the Supreme Court of Pennsylvania affirming in part and reversing in part the Order and Opinion of the Commonwealth Court of Pennsylvania, dated

February 14, 1983, and designates the entire judgment, opinion and decision of the Supreme Court of Pennsylvania to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under provisions of 28 U.S.C. Section 1257(3).

ROBERT MORRIS COHEN
Attorney at Law
130 Greenwood Avenue
Wyncote, Pennsylvania 19095

Attorney for Appellant-
Petitioner

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88-922

Office - Supreme Court, U.S.

FILED

NOV 28 1983

ALEXANDER L. STEVENS
CLERK

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APPENDIX "A"

SUPREME COURT OF PENNSYLVANIA
Eastern District

LAWRENCE WILLIAM ROSENWALD, : NOS. 30 & 31
Individually and on behalf of all : Appeal Docket
constables in Montgomery County: 1983
and the Commonwealth of Penna.

Appellant at No. 30

v.

(Commonwealth
Court No.

ALEXANDER F. BARBIERI,
Court Administrator of
Pennsylvania

66 T.D.
1980)

Appellant at No. 31

J U D G M E N T

ON CONSIDERATION WHEREOF, it is now here
ordered and adjudged by this Court that the ORDER
of the COMMONWEALTH COURT, be, and the same is
hereby AFFIRMED insofar as it sustained the preli-
minary objections of Attorney General of Penn-
sylvania, the President Judge of the Court of
Common Pleas of Montgomery County the District
Justice of Montgomery County and Cheltenham Town-
ship. The ORDER is REVERSED insofar as it over-
ruled the Preliminary Objections of the admin-
istrator.

BY THE COURT:

Dated: July 5, 1983. Marlene F. Lachman, Esq.
Prothonotary

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(J-188-1983)

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

LAWRENCE WILLIAM ROSENWALD, : No. 30 &
Individually and on behalf : No. 31
of all constables in Montgomery : E.D. Ap-
County and the Commonwealth : peal Dkt.
of Pennsylvania, : 1983

Appellant on No. 30 E.D. : Appeal from
Appeal Docket, 1983 Order of
Appellee on No. 31 E.D. : the Court
Appeal Docket, 1983 of Penn-

v.

ALEXANDER F. BARBIERI,
Court Administrator
of Pennsylvania,

Appellee on No. 30 E.D. 1980
Appeal Docket, 1983 :
Appellant on NO. 31, E.D.
Appeal Docket, 1983 : ARGUED:

May 24, 1983

OPINION

JUSTICE ZAPPALA

Filed: July 5, 1983

Plaintiff, Lawrence Rosenwald, is an elected constable of Cheltenham Township, a first class Township in Montgomery County. He and Cheltenham Township District Justice James O'Brien were sued in the Court of Common Pleas of Montgomery

County by Gene Reuben. The complaint was filed on March 17, 1980. Reuben alleged that Eric Klein filed a complaint against her in District Justice O'Brien's court on November 18, 1978 claiming \$ 138.00 for dry cleaning services allegedly rendered, that a judgment was entered for Klein in the amount of the claim on December 6, that an Order of Execution was issued on March 29, 1979, that Reuben paid the judgment and costs on April 3, and that despite such payment¹, Plaintiff posted a notice of a constable's sale on Reuben's property on April 7.

Reuben further asserts that she was libeled and suffered mental distress and embarrassment. The action against the District Justice of Montgomery County was dismissed on the basis of judicial immunity. The action against Plaintiff was dismissed on the basis of the statute of limitations. Reuben appealed as to Plaintiff (Rosenwald) only. The Superior Court held that the claim of improper action on the part of the Plaintiff in his capacity of constable was subject to the six month limitation period for actions against officers of the government for

1. Although the issue of prior payment by Reuben was raised collaterally, it has no bearing in the disposition of the issues now or previously before this Court.

acts done in the execution of their office, Judicial Code, Act of July 9, 1976, P.L. 586, No. 142, effective June 27, 1978, Section 5522, 42 P.C.S.A. Section 5522, and was therefore barred. The court also held that the part of the complaint claiming intentional and malicious libel for the purpose of exposing Reuben to contempt and ridicule and reflecting adversely on her integrity and credit alleged an intentional tort committed outside the scope of Plaintiff's office, was subject to the one year limitation period for libel actions, Judicial Code, Section 5523, 42 P.C.S.A. Section 5523, and was not barred. The case was remanded for further proceedings, Reuben v. O'Brien, 299 Pa. Super. 372, 445 A.2d 801 (1982).

(J-188-1983)

Plaintiff claims he is entitled to be provided with legal representation for the defense of Reuben's suit against him and to have any judgment against him paid. He filed an action against five defendants in the Commonwealth Court seeking a declaratory judgment as to which defendant, if any, is required to represent him. The defendants so named are Court Administrator (Alexander Barbieri; Appellant here, hereafter Administrator), the Attorney General of Pennsylvania, the President Judge of the Court of

Common Pleas of Montgomery County, District Justice of Montgomery County, and Cheltenham Township. All the defendants filed preliminary objections in the nature of a demurrer. The Commonwealth overruled the preliminary objections as to the Court Administrator and sustained the objections as to all other defendants. We granted the Administrator permission for an interlocutory appeal from the Order of the Commonwealth Court insofar as it overruled his preliminary objections. Plaintiff filed a separate appeal asserting error in the Commonwealth Court's sustaining of the preliminary objections as to the other named defendants. We consolidated Plaintiff's appeal with that of the Administrator. An Order dismissing preliminary objections is interlocutory, Marshall v. Powers, 477 Pa. 306, 383 A.2d 446 (1978), but an Order sustaining them is not, Estate of Gasbarini v. Medical Center of Beaver County, Inc. Rochester Division, 481 Pa. 266, 409 A.2d 343 (1979). In reviewing the decision, we will follow the standard set (J-188-1983)

forth in Gekas v. Shapp, 469 Pa. 1, 364 A.2d 691 (1976), where we held that a demurrer to a complaint admits all well-pleaded facts averred in the complaint and that in order for the demurrer to be sustained, the complaint must indicate on its face that the claim cannot be

satisfied and the law will not permit recovery.

As to the asserted claim against the President Judge of the Court of Common Pleas and District Justice of Montgomery County, the Commonwealth Court dismissed Plaintiff's complaint on the basis that "there is no law or rule which creates a duty for either of them to provide legal representation to constables". There is in fact no such legal proviso that requires representation. That being so, we find that the Plaintiff has not established a right to representation. The Commonwealth Court was therefore correct in sustaining the preliminary objections as relates to the Court of Common Pleas of Montgomery County and the District Justice of Montgomery County.

The claims against the other named defendants cannot be dealt with in this fashion because the law does provide under certain circumstances representation by the Court Administrator, the Attorney General of Pennsylvania, and municipalities. It will be necessary to examine specific state provisions and their application to representation of constables.

The obligations of the Attorney General of Pennsylvania to provide legal defense, which Plaintiff claims cover him, are contained in

(J-188-1983)

the Judicial Code, Chapter 85, Subchapter B,

added by October 5, 1980, P.L. 693, No. 142, Section 221(1), 42 P.C.S.A. Sections 8521-8528. These provisions allow suits against the Commonwealth without the bar of the sovereign immunity in certain enumerated situations, 42 P.C.S.A. Section 8522(b). It is provided in 42 P.S. Section 8522 that:

When an action is brought under this subchapter against an employee of the Commonwealth government, and it is alleged that the act of the employee which gave rise to the claim was within the scope of the duties of the employee, the Commonwealth through the Attorney General shall defend the action, unless the Attorney General determines that the act did not occur within the scope of the office or duties of the employee.

This section provides for representation by the Attorney General of Pennsylvania only for employees of the Commonwealth. For purposes of lawsuits covered by this provision, an employee is defined in 42 P.S. Section 8501 as:

Any person who is acting or who has acted on behalf of a government unit whether on a permanent or temporary basis, whether compensated or not and whether within or without

the territorial boundaries of the government unit, including any volunteer fireman and any elected or appointed officer, member of a governing body or other person designated to act for the government unit. Independent contractors under contract to the government unit and their employees and agents and persons performing tasks over which the government unit has no legal right of control are not employees of the government unit.

Plaintiff was neither acting for nor under the control of the Commonwealth. Therefore, he cannot be considered to have been an employee of the Commonwealth.

As to the Administrator, Plaintiff cites Rules of Judicial Administration 505, which states that "The Administrative Office (of Pennsylvania Courts) shall have the power and its duties shall be (inter alia) to provide to personnel of the system (emphasis added) legal services and, when appropriate, representation by legal counsel".

Rule 102 defines "personnel of the system" as "judges and other judicial officers, their personal staff, the administrative staff of courts and justices of the peace, and the staff of the administrative office and other central

staff".

Rule 102 defines "related staff" (emphasis added) as "all individuals employed at public expense who serve the unified judicial system ... (other than) personnel of the system". It defines "system and related personnel" as:

Personnel of the system and related staff. The term includes district attorneys, public defenders, sheriffs and other officers serving process or enforcing orders, registers of wills, prothonotaries, excluding prothonotaries of the Supreme Court, Superior Court and the Commonwealth Court of Pennsylvania, clerks of the courts, clerks of the orphan's court division, prison and correctional officials, and the personnel of all of the foregoing.

We find that the term "related staff" covers those whose function aids the judicial process but who are not supervised by the courts. These definitions, clearly distinguish between "personnel of the system" and "related staff". Under the definitions, we find that Plaintiff is included in "related staff" and not "personnel of the system". As we find that a constable is by definition included in the related staff, we conclude that constables are not by

definition "Personnel of the System", which would permit representation as set forth under Rule 505 of Judicial Administration. As the Plaintiff is not included in "personnel of the system", he is not among those whom the administrator is obligated to provide with legal representation.

In determining whether Plaintiff is entitled to be provided with legal representation by Cheltenham Township, we must first determine whether he is an officer or employee of the township. Plaintiff claims that he is covered by the Judicial Code, 42 P.C.S.A. Section 8547:

(a) Mandatory provision of legal assistance generally.--When an action is brought against an employee of a local agency for damages on account of an injury to a person or property, and it is alleged that the act of the employee which gave rise to the claim was within the scope of the office or duties of the employee, the local agency shall, upon the written request of the employee, defend the action, unless or until there is a judicial determination that such act was not within the scope of the office or duties of the employee.

(b) Optional provision of legal

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assistance generally.--When an action is brought against an employee of a local agency for damages on account of an injury to a person or property, and it is not alleged that the act of the employee which gave rise to the claim was within the scope of his office or duties, the local agency may, upon the written request of the employee, defend the action, and such undertaking to defend thereafter may be withdrawn only with the approval of the court. If the local agency has refused a written request to defend the action, and it is judicially determined that the act was, or that the employee in good faith reasonably believed that such act was, within the scope of the office or duties of the employee and did not constitute a crime, actual fraud, actual malice or willful misconduct, the local agency shall reimburse the employee for the expenses of his legal defense in such amounts as shall be determined to be reasonable by the court.

The Code provides at 42 P.S. Section 8548 that:

When an action is brought against an employee of a local agency for damages on account of an injury to a person or property, and he has given timely prior written notice to the local agency, and it is judicially determined that an act of the employee caused the injury and such act was, or that the employee in good faith reasonably believed that such act was, within the scope of his office or duties, the local agency shall indemnify the employee for the payment of any judgment on the suit.

The definition of an employee as quoted in Section 8501 is applicable under the terms of that section to actions against any governmental unit, including a local agency. We find that Plaintiff was neither acting on behalf of nor under the control of Cheltenham Township and was, therefore, not an employee of the township. Service of process in a case before a District Justice may be made by any constable in the county where the magisterial district is located, Rule of Civil Procedure for District Justices 307. Plaintiff could serve process in a case not being tried in the magisterial district where Cheltenham Township is located and not otherwise having anything to do with the township. The township does not have the abi-

lity to control Plaintiff's activities, regardless of which magisterial district he is working in. We note further that a constable is not paid by the municipality, but is compensated by fees for services, Act of July 20, 1917, P.L. 1158, as amended, 13 P.S. Section 61. We also note the First Class Township Code Act of June 24, 1931, P.L. 1206, Art. V. Section 503, as amended, 53 P.S. Section 55503, which enumerates the elected officers of the township and does not include the constable. (The Code) "...does not include any provisions, and shall not be construed to repeal any act, relating to... (inter alia) constables", Art. I., Section 603, as amended.

We find, therefore, that the Plaintiff is not entitled to any representation from the named defendants. This Court is being requested to do by judicial fiat what is rightfully the prerogative and responsibility of the legislative branch of government. Heretofor, specific provisions have been made to provide legal representation. See, e.g., The County Code, Act of August 9, 1955, P.L. 323, Section 1213, as amended, 16 P.S. Section 1213, relating to sheriffs.

The Order of the Commonwealth Court is affirmed insofar as it sustained the preliminary objections of Attorney General of Pennsylvania, the President Judge of the Court of Common Pleas

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of Montgomery County, the District Justice of Montgomery County, and Cheltenham Township. The Order is reversed insofar as it overruled the preliminary objections of the Administrator.

Mr. Justice Nix did not participate in the consideration or decision of this case.

Mr. Justice Hutchinson did not participate in the decision of this case.

Mr. Justice Larsen dissents.

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APPENDIX "B"

SUPREME COURT OF PENNSYLVANIA
Eastern District

Marlene F. Lachman, Esq. 468 City Hall
Prothonotary Philadelphia, PA 19107
 (215) 496-4600

PATRICK TASSOS
Deputy Prothonotary

September 6, 1983

Robert Morris Cohen, Esq.
130 Greenwood Avenue
Wyncote, Pa. 19095

RE: Lawrence William Rosenwald,
individually, and on behalf
of all constables in Mont-
gomery County, etc.
Appellant v.
Alexander Barbieri, Court
Administrator of Pennsyl-
vania, etc., Appellee
Nos. 30 and 31 E.D. Appeal
Docket 1983

Dear Mr. Cohen:

This is to advise you that the following
Order has been endorsed on the Application for
Reargument, filed in the above-captioned matter:

September 2, 1983

Application for Reargument
denied. Per Curiam.

A-16

Very truly yours,

Marlene F. Lachman, Esq.
Prothonotary

Patrick Tassos,
Deputy Prothonotary

PT:jpa

cc: Kevin P. O'Neill, Esq.
Marc G. Brecher, Esq.
Gilbert P. High, Jr., Esq.
Howard W. Abramson, esq.
West Publishing Company